



STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

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TELECOMMUNICATIONS

IN THE MATTER OF THE BOARD INVESTIGATION) ORDER ON MOTIONS TO
REGARDING THE RECLASSIFICATION OF INCUMBENT) STRIKE AND TO COMPEL
LOCAL EXCHANGE CARRIER (ILEC) SERVICES AS)
COMPETITIVE)
) DOCKET NO. TX07110873

(SERVICE LIST ATTACHED)

BY COMMISSIONER FREDERICK F. BUTLER:

By Order dated November 28, 2007, in response to a request from Verizon New Jersey, Inc. ("Verizon"), the Board initiated this proceeding to fully investigate and consider the question of whether incumbent local exchange carrier ("ILEC") provided mass market retail services should be declared competitive pursuant to criteria set out in N.J.S.A. 48:2:21-19 (b), namely, ease of market entry, presence of other competitors and availability of like or substitute services in the relevant geographic area. This Order memorializes oral rulings made at the evidentiary hearing held on February 25, 2008.

Rate Counsel's Motions to Strike Testimony

On February 20, 2008, with hearings scheduled to begin on February 25, 2008, Rate Counsel moved to strike portions of the December 14, 2007 and January 29, 2008 testimony of Paul Vasington filed on behalf of Verizon. Rate Counsel maintains that in violation of the NJ Rules of Evidence and NJAC 1:1-15.9, Mr. Vasington does not have the proper qualifications to testify as an expert, his opinions are "net opinions," and, in light of his lack of qualifications as an expert, his testimony should not be admitted as lay opinion because it is not based on his own perceptions. Rate Counsel requested expedited treatment of its motion and a decision prior to hearings.

On February 22, 2008, Verizon filed a response to Rate Counsel's motion to strike Paul Vasington's testimony. Verizon stated Rate Counsel's motion is untimely as it has had Mr. Vasington's testimony for quite some time yet waited until just before the commencement of hearing to file its motion. Additionally, Mr. Vasington's experience makes him qualified to testify on the status of competition in the New Jersey telecommunications market place and regulatory

policy involving basic economic principles. In his current position with Verizon, he has testified in several states including Pennsylvania, Arizona, Delaware, New Hampshire, Maine, Rhode Island and Vermont. He served with the Massachusetts public utility commission for more than 10 years, and, among other engagements, has been invited to testify before the Senate Commerce Committee on competition and broadband deployment.

Further, after close of business on February 21, 2008, Rate Counsel moved to strike portions of the December 14, 2007 and January 29, 2008 testimony of Embarq's witness, Dr. Brian Staihr. Rate Counsel maintains that those portions of Dr. Staihr's testimony that discuss the three statutory criteria for reclassification, and the relevant geographic and product markets must be stricken because he has failed to provide sufficient support for his opinions making them, in Rate Counsel's words, "net opinion" inadmissible under N.J. Rules of Evidence. In the alternative, Rate Counsel submits that if the testimony is admitted into the record, it should be given limited weight as a factual basis for any decision. Rate Counsel has requested expedited treatment of this motion as well.

On February 22, 2008, Embarq responded to the motion, arguing that Rate Counsel's motion is untimely as it had Dr. Staihr's entire testimony for at least 3 weeks but waited until the eve of hearings, and that the motion is based on the unfounded assumption that the testimony of an expert economist must be supported by econometric studies, analyses, surveys or other empirical support instead of on facts and data made known to the witness before the hearing, and within the scope of the witness's special knowledge, subject to cross examination.

At the February 25, 2008 hearings, Rate Counsel responded to the objections of Verizon and Embarq. Rate Counsel pointed out that in the past Verizon has sponsored an economist as a witness, but has failed to do so here. Additionally, in Rate Counsel's opinion the witnesses failed to provide support for the conclusions reached, and their testimony should therefore be given no weight if admitted into evidence at all.

Discussion

N.J.A.C. 1:1-15.1 provides general guidance on evidence issues in a contested case before an administrative agency. According to the rule, evidence rulings are to be made with the goal of promoting fundamental principles of fairness and justice, and to aid in ascertaining the truth. All relevant evidence is admissible, and the formally adopted NJ rules of evidence do not apply except as specifically provided by the NJAC. The hearing officer has the discretion to exclude relevant evidence if its admission will create undue prejudice or confusion, or necessitate undue consumption of time.

N.J.A.C. 1:1-15.8 provides that, subject to exclusions not relevant here, every person is qualified to be a witness. To qualify as an expert, there must be evidence that the witness has personal knowledge of the matter OR has special experience, training or education. Under relevant case law, the determination of whether a witness qualifies as an expert is left to the sound discretion of the hearing officer. Rempfer v. Deerfield Packing Corp., 4 N.J. 135 (1950).

The requirements for expert qualification are in the disjunctive, and can be based on knowledge or training or experience, including expertise acquired over a period of years. Expert testimony is admissible where the witness has peculiar knowledge or experience not common to the world which makes his opinion useful to the finder of fact.

Based on the information provided by Verizon, I am persuaded that Mr. Vasington qualifies as an expert due to his special knowledge, skill, experience and training. I am also persuaded that his testimony will be useful to me as the trier of fact. While I am aware that Mr. Vasington is not an economist, I am persuaded that this does not bar the admission of his testimony, but goes to the weight that it should be accorded on economic issues. Therefore, I HEREBY FIND that Mr. Vasington may testify as an expert witness.

Rate Counsel's motions also seek to strike portions of both Mr. Vasington's and Dr. Staihr's testimonies on the grounds that they have failed to adequately support their conclusions as to the key issues in this proceeding, and therefore each witness's testimony constitutes a "net opinion" which should be excluded under the New Jersey Rules of Evidence. As recently described by the New Jersey Supreme Court, the net opinion rule forbids the admission into evidence of an expert's conclusions that are not supported by any factual evidence or other data, and requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion. State v. Fortin, 189 N.J. 579 (2007).

After review of the motions, responses and the relevant testimony, Rate Counsel's motions do not persuade me that the testimonies of Dr. Staihr and Mr. Vasington are nothing more than mere guesswork, and consist of only bare conclusions. Accordingly, I HEREBY FIND that upon appropriate motion of counsel, the entire testimony of Dr. Staihr and of Mr. Vasington may be admitted into the record, to be accorded such weight as the testimony deserves.

Of course, as provided by N.J.A.C. 1:1-15.9, expert witnesses may be examined concerning the data upon which their opinions are based, keeping in mind that if the facts and data are of a type reasonably relied upon by experts in the field, those facts and data need not be admissible into evidence. An expert may rely on his own knowledge, as well as on facts supplied by others, but the weight accorded to the expert's opinion can rise no higher than the facts upon which it is based. Bellardini v. Krikorian, 222 N.J. Super. 457 (App. Div. 1988).

Motions to Compel

On February 20, 2008, Rate Counsel filed a Motion to compel Verizon New Jersey to provide full and complete data, information and documents requested by Rate Counsel under numbers RC-VNJ – 188, 199, 203, 210, and 211 thru 215. In addition, Rate Counsel asks that the Board Compel Verizon to identify the sponsoring witness for each response given to the discovery requests at issue.

Generally, Rate Counsel argues that Verizon's responses were improperly redacted; were insufficient, and that Verizon is the only party with the information being sought. Rate Counsel argues that all information requested is calculated to lead to discoverable and admissible evidence, and that Rate Counsel has a right to examine the information requested. Verizon responded on February 22, 2008, arguing that the motion should be denied because it fails to overcome Verizon's valid objections and ignores the substance of Verizon's responses.

On February 21, 2008, Rate Counsel filed a Motion to Compel Embarq to provide full and complete data, information and documents requested by Rate Counsel under numbers RC-EM – 122, 123, 125, 129, 131, 138, 140 and 141. Rate Counsel argued that the information sought in connection with DS1 and DS3 loops is relevant and essential in determining the accuracy of Embarq's testimony as to the presence of competitors in the market and barriers to entry. Rate Counsel stated that it has no other source for discovery of the information, and believes Embarq

is able to provide the information without a special study, as claimed by Embarq. In addition, Rate Counsel sought the identity of the witness sponsoring the response to each request at issue.

On February 22, 2008, Embarq responded to the motion, arguing that Rate Counsel's motion should be denied because Rate Counsel had failed to meet and confer prior to filing the motion, and the motion was untimely. On the merits, the questions had either been sufficiently responded to, sought information relating to wholesale services and costs that are beyond the scope of this proceeding, or failed to have any nexus to Embarq's rebuttal testimony. At the hearing, Rate Counsel responded to the objections of Verizon and Embarq. Rate Counsel maintained that all of the information requested is relevant and necessary for Rate Counsel to test the positions of the ILECs that there is competition in their respective territories. Additionally, the responses provided were not sufficient as claimed by Verizon and Embarq.

I have reviewed the motions and each of the discovery requests, responses and supplemental responses, objections and replies and I HEREBY FIND the following:

First, with respect to the Motion to Compel Verizon, I DENY the motion in its entirety. The nine requests seek confidential third party information, information outside the scope of the proceeding including information about companies outside our jurisdiction or have been sufficiently answered. Additionally some requests are overly broad asking for all testimony, and cost studies for Verizon and its subsidiaries or affiliates filed in any federal or state proceeding or all Verizon Corporate plans. As previously stated by the Board, the focus of this proceeding is the telecommunications market in New Jersey.


With respect to the Motion to Compel Embarq, I also DENY the motion in its entirety. The eight requests either seek information about wholesale services which are beyond the scope of this proceeding, have been sufficiently answered or would require a special study. Additionally, since Embarq has only one witness, there is no need to compel the identity of sponsoring witnesses.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED:

3 - 3 - 08

BY:



FREDERICK F. BUTLER
COMMISSIONER

**IN THE MATTER OF THE BOARD INVESTIGATION REGARDING THE
RECLASSIFICATION OF INCUMBENT LOCAL EXCHANGE CARRIER
(ILEC) SERVICES AS COMPETITIVE**

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